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In The
Supreme Court of the United States

AMERICAN CHIROPRACTIC ASSOCIATION, INCORPORATED, a non-profit corporation, *et al.*,
Petitioners,

v.

TRIGON HEALTHCARE, INCORPORATED, *et al.*,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

From 1962 and officially through 1980, the American Medical Association conducted a "lengthy, systematic, successful, and unlawful" campaign to eradicate chiropractic as a profession. *See Wilk v. American Medical Ass'n*, 895 F.2d 352, 367 (7th Cir. 1990), *cert. denied*, 498 U.S. 982, 111 S. Ct. 513 (1990). An ethics ban on all referrals between medical doctors and chiropractors was the centerpiece of that illegal boycott by the AMA. This case represents the remnants of the illegal medical physician boycott scattered by the injunction against the AMA in the *Wilk* case.

(1) Is Sherman Act § 1 rendered non-existent by the Fourth Circuit's marked departure from and overreaching application of this Court's seminal *Copperweld* decision, and three Circuit Courts' implementation of that decision, on intra-corporate immunity, where it holds that medical doctors representing Virginia's professional medical associations and the medical physician employees of Virginia's largest healthcare insurance company, who combined to jointly issue fraudulent lower back pain treatment and industry referral standards, are a single entity which is incapable of conspiring because all of the representatives of the state's medical societies are "agents" of the insurance company?

(2) Did the Fourth Circuit violate longstanding antitrust jurisprudence when it held, contrary to decisions of the Sixth, Eighth and Eleventh Circuits, that a health insurance company and its medical doctor employees and medical doctors appointed by and representing competitive state medical doctor associations, who agreed to adopt fraudulent industry-wide referral treatment and reimbursement guidelines to limit the flow of insurance monies to chiropractors, were incapable of conspiring or combining because the medical doctor association representatives became "agents" of the insurance company?

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

CORPORATE PLAINTIFF-APPELLANTS

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The American Chiropractic Association, Inc., is a trade association; there is no parent or publicly held company owning 10% or more of the stock.

(2) Virginia Chiropractic Association, Inc.

The Virginia Chiropractic Association is a trade association; there is no parent or publicly held company owning 10% or more of the stock.

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Trigon Insurance Co.
Trigon Administrators, Inc.
Mid-South Insurance Company
Anthem, Inc.

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OPINIONS BELOW

The Fourth Circuit Decision, from which this Petition comes, is reported at 367 F.3d 212 (4th Cir. 2004), and is reprinted at App. 1a - 42a. The June 2, 2004 Fourth Circuit denial of the Petition For Rehearing and Petition For Rehearing *En Banc* is not reported in the official reporters, and is reprinted at App. 60a - 61a. The April 25, 2003 summary judgment decision of the District Court for the Western District of Virginia, is reported at 258 F. Supp. 2d 461 (W.D. Va. 2003), and is reprinted at App. 43a - 59a.

JURISDICTIONAL STATEMENT

The Fourth Circuit denied the Petition For Rehearing en banc on June 2, 2004. This Petition For Writ of Certiorari is timely because it has been filed within 90 days of June 2, 2004. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves the interpretation of and application of Section One of the Sherman Act, 15 U.S.C. § 1, and Section Four of the Clayton Act, 15 U.S.C. § 15(a). The relevant part of Sherman Act Section One provides:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.

15 U.S.C. § 1 (2004). The relevant part of Section Four, subsection (a) of the Clayton Act provides:

> a) Amount of recovery; prejudgment interest
>
> Except as provided in subsection (b) of this section, any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent,

> without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

15 U.S.C. § 15(a) (2004).

STATEMENT OF THE CASE

The Fourth Circuit affirmed the District Court's summary judgment ruling in this antitrust case that representatives of competitive state medical doctor associations - comprising more than 90% of the medical doctors in Virginia -- became "corporate agents" of Virginia's largest insurance company, where they collaborated to create, adopt and endorse state-wide back pain treatment, referral and insurance-reimbursement guidelines, which created industry standards affecting reimbursement based upon how medical doctors refer back pain patients for treatment for insurance purposes, and which guidelines fraudulently excluded doctors of chiropractic.

The plaintiffs, the American Chiropractic Association, the Virginia Chiropractic Association, and individual chiropractors and patients, believe the lower court rulings are legal error because separate distinct entities combined to restrain trade and directly harm chiropractors -- direct competitors of the medical doctors -- and their patients and potential patients.

The facts of this case were not written on a clean slate. Medical doctors, and specifically the American Medical Association ("the AMA"), its 1990 state, county and local affiliated societies, and numerous other medical specialty groups, sought for many, many years to eradicate chiropractic as a profession.

In 1962, the AMA undertook a "lengthy, systematic, successful, and unlawful" campaign to eradicate chiropractic as a profession. *See Wilk v. American Medical*

Ass'n, 895 F.2d 352, 367 (7th Cir. 1990), *cert. denied*, 498 U.S. 982, 111 S. Ct. 513 (1990). App. 393a - 448a. The illegal conduct officially lasted until 1980, but the effects of that unlawful campaign by the AMA still linger. *See Wilk*, 895 F.2d at 357 (noting that the District Court found that "chiropractors continued to suffer [after the illegal boycott officially ended] because the boycott's negative effects (namely, inhibiting AMA members' individual decision-making in their relationships with chiropractors) still remained.")). A primary focus of the illegal boycott was to prevent all medical referrals to or from chiropractic as unethical. *Id.*, at 372.

Subsequently, representative agents appointed by almost every medical doctor association in Virginia, whose membership is comprised of nearly all of Virginia's medical doctors, combined with Trigon Healthcare, Inc., by far Virginia's largest private health insurer (a Blue Cross/Blue Shield licensee), at the request of Trigon, to form what was deemed a "Managed Care Advisory Panel" ("MCAP"). As the Fourth Circuit acknowledged, "[Plaintiff] American Chiropractic is undoubtedly correct that medical doctors and insurance companies do not, generally speaking, share a unity of interest." Fourth Circuit Decision, at 14 (App. 17a).

The MCAP members combined and agreed, incorrectly, fraudulently, and contrary to a thorough, unbiased and extensive U.S. Government study by the Agency for Health Care Policy and Research ("AHCPR"), to disseminate false back pain referral and treatment guidelines to 90% of Virginia's medical doctors. The industry standard guidelines created by the MCAP were fraudulent because they failed to acknowledge or recommend referral for chiropractic spinal manipulation for back pain. Chiropractic spinal manipulation is offered almost exclusively by chiropractors and was proven in the AHCPR study to be as or more effective a medical modality as, and more cost-effective than, the services offered exclusively by medical doctors.

What emerged from the conspiracy of the MCAP was a historical and scientific distortion of the content of the AHCPR study. According to Dr. Scott Haldeman, a world renowned authority and a member of the AHCPR panel:

> By omitting the AHCPR's definitions of manipulation, Trigon and its Managed Care Advisory Panel materially altered the recommendations of the AHCPR. That alteration created a Trigon guideline that did not recommend the manipulation that is provided primarily by doctors of chiropractic as did the AHCPR Guidelines. A point that became evident from the AHCPR guidelines was that manipulation was the only treatment approach that required a medical physician, in most instances, to make a referral of a patient with uncomplicated low back pain. The inevitable, and obviously intended, consequence of Trigon's and the Managed Care Advisory Panel's alteration of the AHCPR guideline, is to deprive patients of the benefit from spinal manipulation as practiced by doctors of chiropractic, and to deprive doctors of chiropractic of the opportunity to treat those patients.

App. 212a.

Trigon and the MCAP then officially "approved" and adopted their false referral guideline, and disseminated it to every medical doctor in Virginia in Trigon's network, thereby establishing their individual referral policies and deterring the individual medical doctors from referring patients with lower back pain to chiropractors. The false referral guideline adopted, approved and endorsed by the medical doctors on the MCAP and the Trigon insurance company comprised an anticompetitive "contract, combination or conspiracy in restraint of trade," which favored and benefited the medical doctors, and the medical organizations and members they represented, who

combined with Trigon to disseminate it, to the detriment of chiropractic and their patients.

The Fourth Circuit Court of Appeals, affirming the District Court summary judgment below, held that the medical doctors, who were appointed as representatives of the Virginia medical societies, became corporate agents of the insurance company solely by virtue of their combination on a "panel" and, therefore, that these otherwise independent actors became a single entity which could not as a matter of law combine or conspire. App. 47a – 53a; App. 17a – 18a.

The Fourth Circuit holding directly conflicts with and undermines this Court's holding in *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 104 S. Ct. 2731 (1984) (App. 305a – 362a), and other decisions of this Court, by holding that admittedly separate and independent economic actors became a single entity, as agents of one another, as a matter of law merely because they embarked on a common scheme. This holding renders void any concept of a conspiracy or combination.

The Fourth Circuit holding also directly conflicts with and undermines this Court's holding in *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 108 S. Ct. 1931 (1988) (App. 363a – 392a), by holding that an industry standard-setting combination of separate economic entities is never subject to antitrust scrutiny under Section One of the Sherman Act. The Fourth Circuit holding also directly conflicts with holdings of the Sixth Circuit, the Eighth Circuit, and the Eleventh Circuit, as set forth *infra*.

The Fourth Circuit holding has far-reaching and dire effects on the law of antitrust and on healthcare in the United States. The holding is not limited to the facts of the case. The result of the Fourth Circuit Decision is that medical associations and insurance companies can legally combine and conspire to expressly set industry standards that limit patient referrals, and thus insurance reimbursement and healthcare treatment, to any selected healthcare providers (*i.e.*, expressly restrain the healthcare

trade) to the detriment of patients and other competing healthcare providers. This result is at odds with the very analogous conspiracy found by the Seventh Circuit in the *Wilk* case, *supra* pp. 2-3, to be a gross antitrust violation, and will perpetuate the long-lasting effects of that illegal conspiracy.

BACKGROUND OF THE CASE

The plaintiffs in this case are The American Chiropractic Association, comprised of doctors of chiropractic throughout the United States, the Virginia Chiropractic Association, and individual doctors of chiropractic, and patients of doctors of chiropractic. The defendants are Trigon Healthcare, Inc. ("Trigon") and its healthcare subsidiaries that do business as Trigon in Virginia.

This case was filed in 2000, but the anticompetitive conduct by medical doctors against chiropractic dates back to at least 1962 when the AMA formed its now-infamous "Committee on Quackery" to "eliminate chiropractic" as a medical profession. *Wilk*, 895 F.2d at 356. This historical conspiratorial and unlawful conduct by the AMA and its co-conspirators against chiropractic should be understood as a backdrop to this antitrust action involving over 90% of the medical doctors in Virginia. App. 393a - 448a.

This case, and the Decision of the Fourth Circuit ("Fourth Circuit Decision"), has potentially profound financial and healthcare ramifications within the Fourth Circuit and potentially throughout the United States. Perhaps most importantly, the outcome of this case will have profound effects on patients with severe musculo-skeletal afflictions, and especially back pain, who may not otherwise have an informed choice of medical care or be financially able to pay their portion for the preferred treatment for lower back pain.

The potential effect is enormous. Studies have found that 100% of the population will be afflicted with back pain at some time during their lifetime. App. 807a; 1045a. Moreover, healthcare in the United States comprises a $1.6

trillion industry. App. 1077a. In 2002, the most recent year for which government data are available, national spending for healthcare was broken down and summarized by the Center For Medicare and Medicaid Services (an agency of the U.S. Department of Health and Human Services), as follows:

> In 2002, national health expenditures totaled $1,553,009 Million [(or $1.55 trillion)].
>
> * * *
>
> Private health insurance expenditures totaled $549,572 Million [$550 billion] (35% of total expenditures, 65% of private expenditures).

App. 1077a (The entire report (file nhe02.zip) can be found at http://www.cms.hhs.gov/statistics/nhe/#download)). Thus, vast amounts of money are spent every year on private health care, mostly funded by private healthcare insurers, like Trigon.

In 1994, the U.S. Government Department of Health and Human Services Agency for Health Care Policy and Research ("AHCPR") issued a non-partisan, unbiased 170-page study entitled "Acute Low Back Pain in Adults," along with an accompanying 30-page "Quick Reference Guide for Clinicians" entitled "Acute Low Back Problems in Adults: Assessment and Treatment." App. 798a – 1040a, 1041a – 1071a. The study was conducted by a multidisciplinary panel comprised of 12 medical physician experts, and other healthcare professionals and consumer representatives, who were brought together by the Agency for Health Care Policy and Research to perform an evidence-based analysis of all research trials on all treatment approaches to acute low back pain in adults. App. 798a - 809a. Abstracts of over 10,000 research papers were reviewed, and almost 4,000 articles were retrieved. App. 819a – 822a.

The AHCPR study took nearly two years to complete. It included a series of specific recommendations for low back pain in the "Quick Reference Guide for Clinicians" attached thereto which was available free for all who wished to copy

and distribute it. App. 802a - 804a; 1041a-71a. Recommendations were for acetaminophen and NSAIDs (Non-Steroidal Anti-Inflammatory Drugs), as well as manipulation in place of medication, or a short trial of manipulation combined with NSAIDs. App. 1055a. Importantly, the AHCPR study specifically defined spinal manipulation as the type of manipulation used by all chiropractors and some osteopaths, rather than other manipulation techniques. App. 859a.

The Associated Press and major newspapers throughout the country immediately recognized that the AHCPR study, which was published on December 8, 1994, was a boon to chiropractors and a potential setback for medical doctors. App. 1072a - 76a. The responsible medical world still looked at the 1994 AHCPR study as a boon to chiropractic in 1998 as indicated in the *Annals of Internal Medicine*, July 1998, published jointly by the American College of Physicians and the American Society of Internal Medicine:

> The Agency for Health Care Policy and Research (AHCPR) recently made history when it concluded that spinal manipulative therapy is the most effective and cost-effective treatment for acute low back pain ... Perhaps most significantly, the guidelines state that unlike nonsurgical interventions, spinal manipulation offers both pain relief and functional improvement.

App. 1040a-i (underlining added)).

In response to the AHCPR study, Trigon and the "Managed Care Advisory Panel" sought to develop lower back pain referral and treatment standards for the 90% of the medical doctors in Virginia that provide Trigon-covered healthcare. App. 1095a - 1104a. Dr. Larry Colley, Vice President of Medical Policy at Trigon, described the MCAP as follows:

> Trigon's internal review process included consultation with, **and approval by representatives appointed by** the Virginia chapter of the American

> Academy of Pediatrics, the Virginia chapter of the American Academy of Family Physicians, the Virginia Society of Internal Medicine, the Virginia chapter of the American College of Physicians, the Virginia chapter of the American College of Surgeons, the Virginia Obstetrical and Gynecological Society, the Medical Society of Virginia, the University of Virginia School of Medicine, Eastern Virginia Medical School and the Medical College of Virginia.

App. 1103a – 04a (emphasis added). The MCAP also had six Trigon employees, four of them medical doctors. App. 1095a. Notably, the MCAP did not include a single chiropractor or chiropractic representative, or any other non-medical doctor healthcare provider. App. 1095a.

The MCAP ultimately adopted and endorsed, and Trigon approved and disseminated to virtually every medical doctor in Virginia, a fraudulent referral and treatment guideline for lower back pain. The minutes from the MCAP adoption meeting show the direct conspiracy:

> **TOPIC**: Approval of Practice Guidelines from Regional Committees 1. Low Back Pain .....
>
> **DISCUSSION**: Dr. Hattwick: we need to go over these one by one – are these referral guidelines?
>
> Dr. Colley: yes, they are referral guidelines.
>
> Dr. Hattwick: we should emphasize that they are referral guidelines, if they are.
>
> Dr. Grinnan: the guidelines are a baseline of what a primary care physician should manage in these categories, and we are reviewing them regionally.
>
> Dr. Hattwick: operationally, these are a mixture of management and referral guidelines.
>
> * * *
>
> **ACTION**: Unanimously adopted by Committee.

App. 1095a - 1102a (underlining added).

The Low Back Pain referral guideline that was adopted by Trigon and the MCAP was false, contrary to the conclusion reached by the extensive and thorough study of the AHCPR, and directly benefited medical doctors to the detriment of both chiropractors and, most importantly, back pain patients. App. 1094a-i to 1094a-x; 1137a; 210a-212a. This referral guideline was fraudulent because it excluded referrals to chiropractors by all Trigon-participating medical doctors -- 90% of the medical doctors in Virginia -- or reference to the chiropractic type of spinal manipulation, and it resulted in insurance reimbursement for treatment to only untrained medical doctors, despite the conclusion of the AHCPR study that chiropractic spinal manipulation was a more effective treatment. App. 210a - 17a. These exclusions denied back pain patients superior medical care, harmed chiropractors and their patients financially, and illegally restrained trade.

The plaintiffs presented uncontroverted evidence to the District Court, and to the Fourth Circuit, that the resulting exclusion of referrals to Virginia chiropractors alone resulted in over $100,942,391 in lost fees from 1996 to 2001. As Dr. Schifrin, Ph.D. testified:

> To this point three losses of income to chiropractors have been identified. These losses, and the measured magnitude of each, are:
>
> Losses from annual caps on patient chiropractic benefits: unspecified but possibly large.
>
> Losses from underpayments caused by discounting non-CMT code treatments and leveling CMT code treatments: $35,450,575.
>
> Losses from deterred demand: $65,492,356.
>
> Total calculable losses to Virginia chiropractors, 1996-2001: $100,942,391.

App. 1137a (Expert Witness Statement of Leonard G. Schifrin, Ph. D.); *see also* App. 156a – 209a (Rand Corporation concluding that chiropractors offer 90% of the spinal manipulation services provided in the United States)).

The Fourth Circuit disregarded nearly all of this. Despite the fact that medical doctors and insurance companies are admittedly independent economic actors, despite the fact that plaintiffs proffered direct and compelling evidence that the separate entities did in fact agree to false treatment guidelines which favor the medical doctors to the detriment of chiropractors as their direct competitors, and despite the fact that the Plaintiffs submitted evidence of substantial economic harm, the Fourth Circuit incorrectly applied the "intracorporate immunity" doctrine and summarily stated,

> American Chiropractic is undoubtedly correct that medical doctors and insurance companies do not, generally speaking, share a unity of interest. That, however, is not the correct inquiry in cases applying the intracorporate immunity doctrine. Instead, we look to whether the medical doctors, in their role as members of the MCAP, share a unity of interest with Trigon that makes them corporate agents of Trigon. We believe that they do.
>
> * * *
>
> Thus, we agree with the district court that Trigon lacked the capacity to conspire, within the meaning of § 1, with its corporate agent, the MCAP or its members.

Fourth Circuit Decision, at 14 App. 17a. That ruling destroys well-established antitrust jurisprudence.

If any healthcare insurance company can combine with any preferred group of healthcare service providers to set medical standards that fraudulently exclude competing healthcare suppliers and harm the excluded suppliers and

patients, Section One of the Sherman Act is effectively revoked.

REASONS FOR GRANTING CERTIORARI

I. The Writ Should Be Granted Because The Fourth Circuit Decision Directly Conflicts With And Guts This Court's Holdings in *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 104 S. Ct. 2731 (1984), and *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 108 S. Ct. 1931 (1988)

The Decision of the Fourth Circuit is contrary to more than 100 years of Supreme Court antitrust precedent, and will render meaningless Section One within the Fourth Judicial Circuit.

In 1984, this Court solidified antitrust law when it decided *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 104 S. Ct. 2731 (1984). App. 305a – 362a. In clarifying "[t]he distinction between unilateral and concerted conduct ... for a proper understanding of the terms 'contract, combination ... or conspiracy' in § 1" of the Sherman Act, this Court stated:

> A § 1 agreement may be found when the conspirators had a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement.

Copperweld, 467 U.S. at 771, 104 S. Ct. at 2742. Ultimately, this Court held that a single corporation is incapable of conspiring, vis-à-vis Sherman Act § 1, with its wholly-owned subsidiary because each entity is not independent and, indeed, because such entities "always have a unity of purpose or a common design." *Id.* (emphasis added). This became known as the "intracorporate immunity" doctrine.

The Fourth Circuit Decision at issue directly conflicts with that clear and express *Copperweld* holding, and inexplicably expands the intracorporate immunity doctrine. The Fourth Circuit first stated:

> [Plaintiff] is undoubtedly correct that medical doctors and insurance companies [the actors comprising the MCAP] do not, generally speaking, share a unity of interest.

App. 17a. Despite this admitted and obvious non-unity of interest of the separate actors in this case, the Fourth Circuit went on to wrongly conclude:

> The individual doctors [who were appointed as representatives of the medical associations], in their role as members of MCAP, shared the same interest as Trigon .... The MCAP is without question a corporate agent of Trigon.

Id. That was the entire basis of the Fourth Circuit decision on the issue of "unilateral conduct" -- that the medical doctors representing every major medical doctor association in Virginia became a "agents" of the defendant insurance company. It directly conflicts with *Copperweld.*

In 1988, this Court again set a clear boundary around exclusionary antitrust activity. In *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 108 S. Ct. 1931 (1988), this Court held that when an association, like the MCAP, combines to set standards in an industry, like the Trigon-adopted back pain referral and treatment guidelines, the standards set by the combination has a "serious potential for anticompetitive harm." 486 U.S. at 505, 108 S. Ct. at 1937. App. 363a - 392a.

> In *Allied Tube*, a group of manufacturers of building materials, which included makers of steel conduit, were members of the National Fire Protection Association ("NFPA"), an organization which developed and updated a model electric code, mainly for use by state and local governments in setting standards for construction. The code was highly influential. Many local governments adopted it virtually verbatim, and many insurance companies refused to insure buildings that did not meet the

> code's requirements. Then, Indian Head, a relatively small firm, developed an alternative to steel conduit made of polyvinyl chloride. This plastic conduit was cheaper to make and cheaper and easier to install. Further, since it was made of a non-conductor, it was less susceptible to short circuits. When Indian Head attempted to have the plastic conduit approved in the NFPA's model code, the defendant makers of steel conduit "packed" the relevant NFPA meeting with their own agents and employees. Allied alone sent 155 people to the meeting, most of whom had no knowledge about the merits of plastic conduit, and the new conduit was disapproved by a vote of 394 to 390.

H. Hovenkamp, *Exclusive Joint Ventures And Antitrust Policy*, 1995 COLUM. BUS. L. REV. 1, 27-28 (footnotes omitted) . App. 449a - 618a. The Supreme Court affirmed the holding below that this conduct by an association and its members to set exclusionary industry guidelines violated Section One of the Sherman Act. *Allied Tube*, 486 U.S. at 508-10, 108 S. Ct. at 1941-42.

The Fourth Circuit disregarded the clear precedent of the Supreme Court, and held that a combination of competitors was incapable of violating the antitrust laws. The cursory factual and logical leap by the Fourth Circuit in the case at bar is 100% at odds with the clear *Copperweld, Allied Tube* and other Supreme Court decisions. Healthcare providers (like medical doctors, doctors of chiropractic, etc.) are necessarily separate and distinct economic entities vis-à-vis healthcare insurers. Healthcare providers supply healthcare services, and insurers purchase healthcare services. Their economic interests in the marketplace are distinct. *See* Fourth Circuit Decision, at 14 (App. 17a).

When the Fourth Circuit declared that, by sole virtue of their having formed a "panel," the appointed representatives of 90% of the medical doctors in Virginia became "agents" of Virginia's largest insurance company, and that these independent market participants now

"shared the same interest" and could not legally "combine" for purposes of Sherman Act, Section One, the Fourth Circuit emasculated Section One, and gutted *Copperweld* and *Allied Tube*, and their progeny. Holding, as the Fourth Circuit did, that whenever independent actors combine for a "shared interest" the actors are necessarily immune from a "contract, combination, or conspiracy," is antithetical. Instead of being exempt from antitrust scrutiny, such combinations demand heightened scrutiny, especially where the healthcare providers collaborating with the insurance companies are limited to only medical doctors, to the exclusion of all other healthcare providers, including competing healthcare providers, like chiropractors. The Fourth Circuit got it exactly backward.

Congress and the Supreme Court, since the inception of the antitrust laws, have consistently stated that a combining of independent market participants demands heightened scrutiny because of its potential for consumer harm.

> The reason Congress treated concerted behavior more strictly than unilateral behavior is readily appreciated. Concerted activity inherently is fraught with anticompetitive risk. It deprives the marketplace of the independent centers of decisionmaking that competition assumes and demands. In any conspiracy, two or more entities that previously pursued their own interests separately are combining to act as one for their common benefit. This not only reduces the diverse directions in which economic power is aimed but suddenly increases the economic power moving in one particular direction. Of course, such mergings of resources may well lead to efficiencies that benefit consumers, but their anticompetitive potential is sufficient to warrant scrutiny even in the absence of incipient monopoly.

Copperweld, 467 U.S. at 768-69, 104 S. Ct. at 2740; *see also Allied Tube*, 486 U.S. at 500, 108 S. Ct. at 1937 ("There is no

doubt that the members of such associations often have economic incentives to restrain competition and that the product standards set by such [standard-setting trade] associations have a serious potential for anticompetitive harm.").

Moreover, the actual "combination, contract or conspiracy" need not be nefarious or even express to constitute such "contract, combination or conspiracy" for antitrust purposes. Any "meeting of the minds" between independent economic actors that unlawfully restrains trade is subject to heightened scrutiny. Thus, the Fourth's Circuit's statement, that Plaintiffs did not present sufficient direct evidence of a conspiracy, is both factually wrong, and legal error. App. 19a –22a. As was shown, the independent medical doctor associations and Trigon unanimously agreed to the fraudulent "referral guidelines." The minutes from the MCAP adoption meeting show the direct conspiracy. *Supra*, p. 9. Thus, the Fourth Circuit statement, that "At most, the MCAP meeting shows contact between two independent economic actors," is inexplicable and wrong. *See* Fourth Circuit Decision, at p. 17. App. 21a.

The Fourth Circuit noted that the MCAP approved guidelines prepared by Trigon and couldn't require Trigon to revise those guidelines. App. 17a – 18a. This is entirely irrelevant.

> It is elementary that an unlawful conspiracy may be and often is formed without simultaneous action or agreement on the part of the conspirators. ... Acceptance by competitors, without previous agreement, of an invitation to participate in a plan, the necessary consequence of which, if carried out, is restraint of interstate commerce, is sufficient to establish an unlawful conspiracy under the Sherman Act.

Interstate Circuit, Inc. v. United States, 306 U.S. 208, 227, 59 S. Ct. 467, 474 (1939) (citations omitted).

As in the Beech-Nut case, there is more here than

> mere acquiescence of wholesalers in Soft-Lite's published resale price list. The wholesalers accepted Soft-Lite's proffer of a plan of distribution by cooperating in prices, limitation of sales to and approval of retail licensees. That is sufficient.
>
> * * *
>
> Whether this conspiracy and combination was achieved by agreement or by acquiescence of the wholesalers coupled with assistance in effectuating its purpose is immaterial.

United States v. *Bausch & Lomb Optical Co.*, 321 U.S. 707, 723, 64 S. Ct. 805, 813 (1944).

Holding that a combination of otherwise independent entities are necessarily immune from Section One of the Sherman Act, as the Fourth Circuit did, unravels the entire fabric of antitrust law.

> It is useless for the defendants to say they did not intend to regulate or affect interstate commerce. They intended to make the very combination and agreement which they in fact did make, and they must be held to have intended (if in such case intention is of the least importance) the necessary and direct result of their agreement.

Addyston Pipe & Steel Co. v. United States, 175 U.S. 211, 243, 20 S. Ct. 96, 108 (1899).

> It is not the form of the combination or the particular means used but the result to be achieved that the statute condemns. It is not of importance whether the means used to accomplish the unlawful objective are in themselves lawful or unlawful. Acts done to give effect to the conspiracy may be in themselves wholly innocent acts. Yet, if they are part of the sum of the acts which are relied upon to effectuate the conspiracy which the statute forbids, they come within its prohibition.

American Tobacco Co. v. United States, 328 U.S. 781, 809, 66 S. Ct. 1125, 1139 (1946); *see also United States v. General Motors Corp.*, 384 U.S. 127, 142-43, 146, 86 S. Ct. 1321, 1328-31 (1966); *United States v. Paramount Pictures*, 334 U.S. 131, 140, 68 S. Ct. 915, 921 (1948) ("It is not necessary to find an express agreement in order to find a conspiracy").

The Fourth Circuit rejected all of this precedent when it summarily held that plaintiffs failed to produce direct, or indirect, evidence of an unlawful conspiracy between Trigon and the Virginia medical associations, whose representatives were members of the MCAP. In fact, although such direct evidence was not necessary (especially on summary judgment), plaintiffs did present uncontroverted evidence of a direct combination and conspiracy that restrained trade. The MCAP brought together representatives of every major medical doctor association in Virginia with its own medical doctor employees, who expressly agreed to adopt and publish false industry standards. *See, supra.*

The documentary evidence is clear and was uncontroverted on summary judgment. Trigon proffered its fraudulent guidelines to the MCAP. App. 1095a - 1102a; 17a - 18a. The MCAP then adopted and endorsed these false guidelines. App. 1102a; 1094a-v. Trigon then disseminated these guidelines to nearly every medical doctor in Virginia, emphasizing that the guidelines were "approved and endorsed" by the MCAP. App. 1094a-v. This direct and uncontroverted evidence was simply ignored by the Fourth Circuit. That violates this Court's longstanding precedent and is legal error.

The conclusion by the Fourth Circuit is contrary to more than 100 years of Supreme Court antitrust precedent, contrary to this Court's seminal *Copperweld* and *Allied Tube* decisions, and will revoke Section One within the Fourth Judicial Circuit.

II. Review Is Warranted Because The Decision Is In Direct Conflict With Decisions Of The Sixth, Eighth, and Eleventh Circuit Courts

The Fourth Circuit Decision directly conflicts with the Sixth Circuit's holding in *Nurse Midwifery Ass'n v. Hibbett*, 918 F.2d 605 (6th Cir. 1990), *modified*, 927 F.2d 904 (1991), *cert denied*, 502 U.S. 952, 112 S. Ct. 406 (1991). In *Nurse Midwifery*, two nurse midwives and a physician who agreed to work with them brought an antitrust action against several hospitals and a physician-controlled insurance company (among others). The plaintiffs alleged in the complaint that the defendant physicians conspired to prevent nurse midwives from competing with obstetrician physicians, and to prevent the physician who assisted the nurse midwives from obtaining insurance.

Physician supervision was required at hospitals for midwife services. In furtherance of the conspiracy, the defendant physicians, *inter alia*, pressured other physicians to refuse to supervise midwives at the defendant hospitals. Further, the defendant hospitals and their medical staffs denied privileges at the hospitals to plaintiff midwives and the physicians who attempted to sponsor and supervise them. *See Nurse Midwifery*, 918 F.2d at 607-611. The District Court granted summary judgment in favor of several defendants, holding, like the Fourth Circuit Decision, that the hospitals were incapable of illegally conspiring because the doctors were "agents" of the hospital and thus they were not separate actors able to combine or conspire. *Id.*, at 614-15. The Sixth Circuit reversed that holding.

The Sixth Circuit expressly held that medical doctors on a hospital panel which made recommendations to the hospital could conspire in violation of the Sherman Act.

> The issue whether the individual members of a hospital's medical staff should be treated as agents of the hospital for antitrust purposes when making a recommendation concerning an application for staff privileges is a difficult one. ... the premise

> underlying the intracorporate conspiracy doctrine, that agents of a firm share a unity of economic purpose with the firm, does not necessarily apply when viewing the relationship between a hospital and its medical staff. The members of a medical staff are not salaried employees of the hospital but are independent medical practitioners, some in direct competition with each other and with applicants for privileges. There is certainly some danger of anticompetitive decision-making when a group of physicians recommends to the hospital that an applicant who is in competition with those physicians be denied privileges at the hospital.
>
> In contrast, the individual members of a hospital's medical staff are in many cases direct competitors with each other. .... when competing physicians are making privilege recommendations concerning another competitor, sufficient anticompetitive concerns are raised to warrant a conclusion that the members of the medical staff are not acting as agents of the hospital for purposes of applying the intracorporate conspiracy doctrine to preclude a conspiracy among staff members.

Nurse Midwifery, 918 F.2d at 614-15 (underlining added). The Fourth Circuit Decision, that medical doctors and insurance companies that combine with a common goal to advise the insurance company and set industry standards cannot combine under Section One, conflicts with this Sixth Circuit precedent.

The Fourth Circuit Decision also conflicts with the Eighth Circuit case of *Mt. Pleasant v. Associated Elect. Coop., Inc.*, 838 F.2d 268 (8th Cir. 1988). In *Mt. Pleasant*, the plaintiff city alleged that the defendant, a group of related rural electric cooperatives, violated Sections 1 and 2 of the Sherman Act. The electric cooperatives were made up of individual companies which each owned and/or operated an electricity generation and transmission grid in the

Midwest. While the Eighth Circuit ultimately held that the cooperatives were a "single entity" for purposes of the Antitrust laws, its analysis is sound, and contrary to the Fourth Circuit Decision (which offered no reasoning).

The Eighth Circuit correctly reasoned that "single entity" immunity must be based on economic reality, and not merely the form taken by the alleged conspirators. The Eighth Circuit refused to hold that combining entities that had a common interest could never "combine or conspire" for purposes of the Sherman Act. Instead, in analyzing the particular facts of the case, the Eighth Circuit stated:

> The critical distinction between this case and Topco [*United States v. Topco Assocs., Inc.*, 405 U.S. 596, 92 S. Ct. 1126 (1972)] is that here there is no evidence that any defendant ever pursued interests antithetical to those of the cooperative as a whole ....

Mt. Pleasant, 838 F.2d at 276. According to the Eighth Circuit, that lack of evidence justified the summary judgment by the District Court. The plaintiff could have defeated summary judgment, if it could

> show specific facts which present a triable issue as to whether any of the defendants has pursued interests diverse from those of the [defendant] cooperative itself.

Id., at 276. Because the plaintiff did not offer any such facts, the summary judgment below was affirmed. Here, on the other hand, the ACA proffered uncontroverted evidence that the fraudulent referral guidelines benefited the medical doctor co-conspirators to the exclusion and economic detriment of chiropractors. *See, e.g.*, App. 210a - 304a; 1105a-1153a.

The Fourth Circuit Decision also directly conflicts with the Eleventh Circuit reasoning and holding in *Bolt v. Halifax Hosp. Med. Ctr.*, 891 F.2d 810 (11th Cir. 1990). In *Bolt*, the defendant peer review committees of the defendant hospitals revoked the plaintiff medical doctor's privileges at

the hospitals. The committees asserted that the plaintiff's abrasive personality and poor professional performance warranted the revocations. The plaintiff asserted that the competing medical doctors on the committees conspired to revoke his privileges, in violation of the antitrust laws. The Eleventh Circuit held that the hospitals and the peer review committees could legally conspire for antitrust purposes, and that the peer review committees were not mere agents of the hospitals.

> To establish a violation of section 1 of the Sherman Act, a plaintiff must prove that two or more distinct entities agreed to take action against him. ... We perceive no basis, however, for holding that the members of a medical staff are legally incapable of conspiring with one another. ...
>
> Additionally, we perceive no basis for holding that a hospital is legally incapable of conspiring with the members of its medical staff. Relying on the rule that a corporation cannot conspire with its officers and directors, ... some courts have held that a hospital cannot conspire with its medical staff for purposes of section 1 liability. ... We find this analogy faulty, however. The rule for corporations is based on considerations unique to the corporate context. ... A hospital and the members of its medical staff, in contrast, are legally separate entities ....

Bolt, 891 F.2d at 817-18 [citations omitted].

The Fourth Circuit Decision flies in the face of each of these cases. The Fourth Circuit acknowledged that medical doctors and insurance companies are normally independent actors who pursue separate economic interests. *See* App. 17a. The Fourth Circuit then ignored the unrebutted evidence that the medical doctors on the MCAP were appointed as representatives of the medical associations of Virginia. App. 17a -22a; App. 1103a - 04a. The Fourth Circuit Decision ignored the admitted fact that the doctors

on the MCAP expressly agreed with Trigon (and the individual Trigon medical doctor employees on the MCAP) to issue the fraudulent treatment and lower back pain referral guideline that diverged from the well-supported federal guidelines and directly benefited medical doctors to the economic detriment of their competition, doctors of chiropractic, and their patients.

The Fourth Circuit Decision directly conflicts with holdings of the Sixth, Eighth and Eleventh Circuit Courts.

III. The Fourth Circuit Decision Has Overreaching And Dire Consequences For Antitrust Law

Since the inception of the Sherman Act, Congress and this Court have emphasized the heightened risk to competition from a combination of otherwise independent economic actors.

> The reason Congress treated concerted behavior more strictly than unilateral behavior is readily appreciated. Concerted activity inherently is fraught with anticompetitive risk. It deprives the marketplace of the independent centers of decisionmaking that competition assumes and demands. In any conspiracy, two or more entities that previously pursued their own interests separately are combining to act as one for their common benefit. This not only reduces the diverse directions in which economic power is aimed but suddenly increases the economic power moving in one particular direction. Of course, such mergings of resources may well lead to efficiencies that benefit consumers, but their anticompetitive potential is sufficient to warrant scrutiny even in the absence of incipient monopoly.

Copperweld, 467 U.S. at 768-69, 104 S. Ct. at 2740; *see also Allied Tube*, 486 U.S. at 500, 108 S. Ct. at 1937 (standard-setting associations have serious potential for anticompetitive harm).

The Fourth Circuit has, in its Decision, directly and completely diverged from that clear jurisprudence. The Fourth Circuit provided no analysis, and cited no specific facts (contested or otherwise), to support its very conclusory result. The entire recitation by the Fourth Circuit is as follows.

> Applying this reasoning here, we agree with the district court that, under the intracorporate immunity doctrine, Trigon lacked the legal capacity to conspire with the medical doctors on the MCAP. American Chiropractic argues that because the medical doctors on the MCAP do not share a unity of interest with Trigon, the MCAP cannot be considered a corporate agent of Trigon. A similar argument was raised and rejected in *Oksanen*. There, the plaintiff had alleged that the medical doctors on the peer review committee did not have a unity of interest with the hospital because the medical doctors would act in their own best interest, not the best interest of the hospital. As mentioned above, we found that the medical doctors, in their role as members of the peer review committee, had a unity of interest with the hospital: ensuring patient care. We believe that *Oksanen's* reasoning is not only instructive but persuasive here.
>
> American Chiropractic is undoubtedly correct that medical doctors and insurance companies do not, generally speaking, share a unity of interest. That, however, is not the correct inquiry in cases applying the intracorporate immunity doctrine. Instead, we look to whether the medical doctors, in their role as members of the MCAP, share a unity of interest with Trigon that makes them corporate agents of Trigon. We believe that they do.
>
> Because Trigon established the MCAP to offer input on clinical issues faced by Trigon, the individual medical doctors, in their role as members

> of the MCAP, shared the same interest as Trigon: addressing clinical issues in a manner that would best serve its consumers, the plan enrollees. The MCAP is without question a corporate agent of Trigon, chaired by a Trigon employee, and we believe that the intracorporate immunity doctrine applies to its actions. The decision to consult with doctors on the MCAP does not "represent the sudden joining of economic forces that section one is designed to deter and penalize." *Oksanen, 945 F.2d at 703.* By creating the MCAP, Trigon did not bring together independent economic forces. Instead, Trigon had "ultimate control" over the MCAP's actions and was able to employ the MCAP to pursue its interests. In fact, we are presented with even stronger reasons for applying the doctrine here than we were in Oksanen because, in Oksanen, the peer review committee and the hospital were legally distinct entities. The MCAP is not legally distinct from Trigon.
>
> American Chiropractic's argument paints with too broad a brush, and would, in effect, undercut much of the rationale of the intracorporate immunity doctrine by focusing on form over substance. Penalizing "coordinated conduct simply because a corporation delegated certain responsibilities to autonomous units might well discourage corporations from creating divisions with their presumed benefits." *Copperweld, 467 U.S. at 771.* "Far from being a competitor with [Trigon], the [MCAP] was in fact a natural component of [Trigon's] management structure." *Oksanen, 945 F.2d at 703.*

App. 16a - 18a. This cursory opinion is faulty. The only thing in common between Trigon and the medical doctor representatives from Virginia's medical societies was the desire to prevent referrals to competitive chiropractors.

The Fourth Circuit Decision effectively revokes Section One of the Sherman Act. According to the Fourth Circuit, as soon as and simply because independent economic actors combine for a common purpose, they "share a unity of interest" and as such necessarily become "agents" of one another that cannot as a matter of law conspire or combine. That logic is perfectly circular -- and disastrous to antitrust jurisprudence.

It is apparent, and conceded in this case, that medical doctors and healthcare insurers are independent economic actors. *See* App. 17a. Thus, their combination, as the MCAP or in any other form, is inherently fraught with anticompetitive risk. *See, e.g. Allied Tube*, 486 U.S. at 505, 108 S. Ct. at 1937.

The Fourth Circuit did not carve out a limited exception to Section One, which would somehow apply to the otherwise inherently anticompetitive combination of the MCAP. Instead, it issued a blanket rule that, once otherwise independent actors join in a common plan, they become "one entity" which is thereby incapable of conspiring or combining. Although the Fourth Circuit cites one (Fourth Circuit) case to superficially apply the intracorporate immunity doctrine, that case (as well as that doctrine) is clearly not applicable here where non-corporate actors are admittedly separate and independent economic entities.

The medical doctors on the MCAP were appointed as representatives of the various Virginia medical associations. App. 1103a - 04a. The clear documentary evidence presented to the District Court and to the Fourth Circuit demonstrated this. *See supra*, p. 9. Trigon is Virginia's largest private insurance company. App. 79a, 130a. The agreement reached by members of the MCAP and Trigon directly affected the medical trade in Virginia -- benefiting medical doctors and harming chiropractic and its patients. Thus, the medical doctor associations and the insurance company did not have the unwavering unity of interest required in *Copperweld* for application of intracorporate immunity. *See Copperweld*, 467 U.S. at 771, 104 S. Ct. at 2741-

42. The combination of the medical doctor associations and the insurance company did, in fact, represent a "sudden joining of economic resources that had previously served different interests." *See Copperweld*, at 467 U.S. at 771, 104 S. Ct. at 2741-42. Moreover, the Virginia-wide back pain treatment standards established by the MCAP not only had a serious potential for anticompetitive harm (*see Allied Tube*, 486 U.S. at 505, 108 S. Ct. at 1937); the evidence was that they indeed harmed competition with chiropractors to the tune of tens of millions of dollars. App. 1105a-1153a.

The Fourth Circuit Decision stands antitrust jurisprudence on its head. If it is allowed to stand as precedent in the Fourth Circuit, the Decision will revoke Section One of the Sherman Act in that Judicial Circuit and further confuse the intra-corporate immunity doctrine throughout the United States.

IV. This Court Should Take This Opportunity To Clarify The Law Of "Single Entity Immunity"

Prior to *Copperweld*, the "intracorporate immunity doctrine" was less than clear. Lower courts and commentators alike struggled with its application to complex antitrust settings. *See Copperweld*, 467 U.S. at 767, 104 S. Ct. at 2740. In *Copperweld*, this Court took the opportunity to establish a clear rule of law regarding the inability of corporations and their subsidiaries to combine in violation of the Sherman Act, Section One.

Since *Copperweld*, however, the lower courts have struggled to determine when and whether non-corporate entities "combine" in violation of the Sherman Act Section One. *Compare Nurse Midwifery Ass'n*, 918 F.2d 605 (6th Cir. 1990); and *Mt. Pleasant*, 838 F.2d 268 (8th Cir. 1988); and *Bolt*, 891 F.2d 810 (11th Cir. 1990); with *Okusami v. Psychiatric Inst.*, 959 F.2d 1062, 1065 (D.C. Cir. 1992) (finding no basis for proposition that hospital and its medical staff have divergent interests); *Oksanen v. Page Mem'l Hosp.*, 945 F.2d 696, 705 (4th Cir. 1991) (en banc) (stating that hospital and its staff should not be seen as possible co-conspirators);

and *Nanavati v. Burdette Tomlin Mem'l Hosp.*, 857 F.2d 96, 118 (3d Cir. 1988) (concluding hospital could not conspire with executive committee); *see also* Craig W. Dallon, *Understanding Judicial Review of Hospitals' Physician Crendentialing And Peer Review Decisions*, 73 TEMPLE L. REV. 597, 659-60, and n. 424 (2000) (citing cases and noting conflicting holdings). App. 619a – 797a.

The First Circuit, in *Fraser v. Major League Soccer, LLC*, 284 F.3d 47 (1st Cir. 2002), expounded on the struggle by the Circuit Courts to apply the intra-corporate immunity doctrine to non-corporate entities. In *Fraser*, soccer player plaintiffs sued the newly-formed Major League Soccer sports league. The league and its teams were all owned by a parent Limited Liability Corporation, but with many complex private ownership interests throughout. Each team and its private owner expressly agreed with the parent corporation owner on all major aspects of team ownership, including player salaries, intellectual property, and many other details. 284 F.3d at 52-55. A central legal issue in the case was whether the various defendants (essentially, the individual teams and the parent league) should be treated as a single entity for purposes of Section One of the Sherman Act. *Id.*, at 55-56.

The First Circuit outlined the varying different outcomes of other Circuit Courts and expressed the difficulties of determining "single entity" status vis-à-vis Section One of the Sherman act.

> *Copperweld* established that a parent and its wholly owned subsidiary are not subject to attack under Section 1 for agreements between them. They are treated for Section 1 purposes as a single economic actor. But what the Supreme Court has never decided is how far *Copperweld* applies to more complex entities and arrangements that involve a high degree of corporate and economic integration but less than that existing in *Copperweld* itself.
>
> * * *

> To sum up, the present case is not *Copperweld* but presents a more doubtful situation; ... The law at this point could develop along either or both of two different lines.
>
> * * *
>
> Once one goes beyond the classic single enterprise, including *Copperweld* situations, it is difficult to find an easy stopping point or even decide [the "single entity" issue] on the proper functional criteria for hybrid cases.

Id., at 56, 58, 59 (underlining added).

The Fourth Circuit Decision at issue is a present-day manifestation of the lack of clarity or understanding within the individual Circuits of when, exactly, multiple non-corporate actors should or should not be deemed a "single entity" for antitrust purposes.

Medical doctor employees of Trigon, representing Trigon (Virginia's largest health insurance company), combined with medical doctors representing every major medical doctor association in Virginia, and published to over 90% of the medical doctors in Virginia false industry standards for treatment and insurance reimbursement guidelines for lower back pain. The false guidelines unlawfully excluded chiropractors and their proven superior services.

These actors had independent economic interests, and were not "corporate agents." Although there was, in fact, a stated common goal of the MCAP, the medical doctor trade association representative participants did not ever shed their underlying personal economic interests as healthcare providers. That would seem to necessitate heightened scrutiny for antitrust purposes. Surprisingly, however, the Fourth Circuit summarily concluded that, simply because the different actors formed a panel for a stated common goal, they necessarily as a matter of law could not "contract, combine or conspire" under Section One of the Sherman Act for any purpose. The law in the Circuits needs to be

defined. The Circuit Courts need guidance as to the meaning of "single entity immunity" under Section One of the Sherman Act.

CONCLUSION

As the Supreme Court has stated:

> Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms.

United States v. Topco Assocs., Inc., 405 U.S. 596, 610, 92 S. Ct. 1126, 1135 (1972).

For all of the foregoing reasons, plaintiffs request that this Court grant this Petition for Writ of Certiorari.

Respectfully submitted,

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